

Exhibit 5

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 IN RE: TERRORIST ATTACKS ON
4 SEPTEMBER 11, 2001,

03 MD 1570 (GBD)
Remote Proceeding

6 -----x

New York, N.Y.
October 29, 2021
3:00 p.m.

8 Before:

10 HON. GEORGE B. DANIELS,

11 U.S. District Judge

12 APPEARANCES

13
14 KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
Attorneys for Defendant Kingdom of Saudi Arabia
15 BY: MICHAEL K. KELLOGG

16 THE LAW OFFICES OF MA & PARK
Attorneys for Non-party John Fawcett
17 BY: MICHAEL GERBER

18 EMILY KIRSCH
Attorney for Interested Party Kreindler & Kreindler
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1 (Case called; The Court and all parties appearing via
2 Microsoft Teams)

3 THE DEPUTY CLERK: Will the attorneys and the parties
4 please state yourself for the record?

5 MR. KELLOGG: This is I Michael Kellogg on behalf of
6 the Kingdom of Saudi Arabia.

7 MR. GERBER: This the Michael Gerber on behalf of John
8 Fawcett.

9 MS. KIRSCH: And this is Emily Kirsch on behalf of law
10 firm Kreindler & Kreindler.

11 THE DEPUTY CLERK: Thank you.

12 We now have the Honorable George B. Daniels presiding.

13 THE COURT: Good afternoon.

14 MR. KELLOGG: Good afternoon, Judge Daniels.

15 MR. GERBER: Good afternoon, your Honor.

16 THE COURT: Mr. Gerber, why don't I hear from you.

17 I have reviewed all of the correspondence relevant to
18 this case and the cases and the declarations and other relevant
19 documents. So, Mr. Gerber, let's hear from you.

20 MR. GERBER: Thank you, your Honor, and thank you for
21 seeing us on such short notice.

22 Your Honor, before I turn to the cases in the legal
23 doctrine, I just first want to put this in context, and what we
24 have here is a situation, which as the Court knows, a hearing
25 is scheduled for Monday and our client has been ordered to

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1 testify at that hearing. At that hearing -- or in connection
2 with that hearing, Judge Netburn is considering whether to make
3 a criminal referral to the U.S. Attorney's office for the
4 Southern District of New York. Our client is being called to
5 testify regarding the subject matter as to which there could be
6 a referral. That is what he is being asked to testify about --
7 directed to testify about. He is, in a literal sense, in a
8 really true sense, being called as a witness against himself
9 and that scenario, where he has been called as a witness at a
10 hearing to determine whether, with respect to his testimony,
11 the subject matter of his testimony, there should be a criminal
12 referral, we believe that is antithetical to the guarantees of
13 the Fifth Amendment.

14 THE COURT: Well, let me ask you a direct question
15 before you go beyond that. Isn't he already called as a
16 witness by submitting his declaration under oath?

17 MR. GERBER: So, your Honor, the two-part Klein test
18 speaks to that issue, particularly on the second prong of
19 Klein. So, one of the questions that the Second Circuit
20 directs the Courts to ask, and which your Honor is asking is,
21 hasn't he already made himself a witness? Hasn't he already
22 waived given the sworn statements? And, your Honor, the law is
23 clear that when there are no grounds for apprehension, that
24 prior testimony does not carry over, does not constitute a
25 waiver in a subsequent proceeding or in a new proceeding.

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1 Now, I think it is undisputed, I think the law is
2 crystal clear that if you have a new proceeding, a different
3 proceeding, you don't have a waiver from a prior proceeding.

4 THE COURT: This isn't a new proceeding.

5 MR. GERBER: So, your Honor, understood, but the point
6 we would make is --

7 THE COURT: He submitted a declaration in the
8 proceeding specifically on the issue that is raised in the
9 proceeding and was not, as they say, dragged in to court to
10 testify about that.

11 MR. GERBER: Your Honor, what has changed, the new
12 grounds for apprehension are the Court's directive not only to
13 have to come testify but, critically, the Court is
14 contemplating a criminal referral and that constitutes new
15 grounds for apprehension.

16 THE COURT: All right, so let's concentrate on that.
17 The first thing I want to ask is, without the new grounds, do
18 you have any argument that he, if there weren't -- if there
19 aren't new grounds or weren't new grounds, that he would have
20 any basis to refuse to testify?

21 MR. GERBER: Yes, your Honor. Yes, because we
22 think -- we respectfully submit, as we say in our papers, that
23 the first prong of Klein is also not satisfied because the
24 Court --

25 THE COURT: I'm sorry. I didn't mean to interrupt

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1 you. Let's say with the new, the changed circumstances.

2 MR. GERBER: Yes, your Honor.

3 THE COURT: I read the transcript, I got the
4 transcript this afternoon from the argument before Magistrate
5 Judge Netburn.

6 MR. GERBER: Yes, your Honor.

7 THE COURT: Two things. One, he is not even
8 referenced with regard, specifically, with regard to a criminal
9 referral; and secondly, wouldn't you have to convince me that
10 prior to any reference to a criminal referral that he did not
11 have a basis to believe that he would subject himself to
12 significant punishment by the Court including criminal contempt
13 for taking acts which were in violation of that order and,
14 therefore, in violation of the law and that would subject him
15 to possible criminal prosecution?

16 MR. GERBER: So several responses, your Honor.

17 First, with regard to the fact, respect to the fact
18 that he is not referenced, by name, in the Court order, that is
19 true but, your Honor, given the facts, as your Honor is well
20 aware, and given what is in the declarations, I don't think
21 there is any real question here, any real factual question that
22 part of what Judge Netburn is considering is a criminal
23 referral with respect to our client. I don't think that's
24 really in dispute as part of what is going on here at the
25 hearing.

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1 THE COURT: That was always possible. That was always
2 possible. That was possible when all of the parties signed the
3 protective order.

4 MR. GERBER: Yes, but your Honor, the second prong of
5 Klein, the test, the new grounds of apprehension, is not about
6 the -- the question that Courts are directed to ask is not, on
7 that piece, what an individual could have surmised or might
8 have surmised at a particular -- sort of at step one. The
9 question is whether facts and the grounds have changed, whether
10 there are new grounds for apprehension, whether someone has
11 been put on notice in an additional way.

12 THE COURT: But that's not the first inquiry. The
13 first inquiry is whether or not there was a sufficient basis
14 for him to understand that if you violated this Court order and
15 then later confessed to it, he could expose himself to criminal
16 prosecution and at least, minimally, a criminal prosecution for
17 a criminal contempt.

18 MR. GERBER: Your Honor, first, I think that for a
19 non-lawyer I did not think that is so obvious at all. I
20 appreciate --

21 THE COURT: But this isn't exactly -- this may be a
22 non-lawyer but not someone who is unfamiliar with the Court
23 process. And a lot of these arguments that you are making
24 about what he could have thought or might have thought, there
25 is absolutely no basis in this record for me to make that

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1 conclusion because he doesn't say any of that. He doesn't say
2 he didn't know that he would be making a serious violation of
3 the Court order which might subject him to punishment and
4 penalties including criminal penalties and somehow, despite his
5 actions that were consistent with that, with understanding
6 that, somehow he didn't know that when he submitted these
7 affidavits. On what basis am I supposed to conclude that
8 somehow he was an ignorant bystander and didn't understand the
9 Court process and didn't understand that if he did what the
10 Court told him not to do that he would be subject to punishment
11 for that and serious punishment even including criminal
12 contempt.

13 MR. GERBER: Your Honor, the protective order -- the
14 core protective order does reference sanctions, it does not
15 reference criminal sanctions or criminal referral. It does not
16 reference criminal contempt.

17 THE COURT: But, again, that's a sideways argument
18 because I have yet to hear you -- say, and I haven't seen in
19 any of his affidavits -- that he thought that he was confessing
20 to something that he couldn't go to jail for.

21 MR. GERBER: Well, your Honor, I can't speak --
22 because of the privilege, I can't speak to what my client has
23 or has not told me what he understood.

24 THE COURT: If you want me to make a conclusion that
25 he somehow didn't understand this when the evidence is that he

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1 has great familiarity with the process; he is a professional,
2 not a layperson. He may not be a lawyer but he is a
3 professional and a lot of his contact is in court. And also,
4 the circumstantial evidence is that -- unless you are
5 representing this or somebody from Kreindler is representing
6 this, there is no reason for me to assume that when he filled
7 out that first affidavit that the law firm and he didn't both
8 understand the seriousness of the information he was getting
9 ready to provide to the Court and that there would be possibly
10 serious consequences without limitation if, once the Court
11 found, saw this affidavit. And this isn't even -- and that's
12 only the first one because then the other question is -- and
13 that's what I am looking for -- the kinds of things you want me
14 to surmise. Where I am supposed to get that from since he
15 doesn't say it, that I am supposed to assume that by the time
16 he voluntarily submitted the second affidavit he didn't know
17 from the very beginning when he submitted the first affidavit,
18 and then after he submitted the first affidavit and there was
19 the big hullabaloo about that that somehow he thought he could
20 do these acts, admit them without impugning.

21 MR. GERBER: Your Honor, our argument is not based --
22 it is true we do not have record evidence about what was in his
23 mind at the time or what he understood. That is the case, we
24 do not have record evidence about that.

25 THE COURT: We do have some record evidence. We know

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1 that his declaration says he took significant steps to make
2 sure that no one found out what he was doing and it doesn't say
3 he wasn't aware of the protective order. It doesn't say he
4 wasn't aware that he would be in contempt of Court if he
5 violated that order. It doesn't say, oh, I'm a layperson and I
6 don't know what goes on in the Court so I thought if I violated
7 the Court's order that somehow I would just get a \$10 fine. He
8 handled this as if this was the most serious conduct that he
9 had ever engaged in in his life in terms of hiding it from the
10 law firm, in terms of hiding it from the Court, in terms of how
11 he destroyed the evidence. So you say, you are right, there is
12 no direct evidence and that would be helpful to him if there
13 was, but there is no direct evidence that he was unaware of the
14 consequences of violating Court's order and the serious nature
15 of, even criminal nature of violating a court order. And I'm
16 not sure that any layperson would -- very few laypeople,
17 reasonable laypeople would say to me that I think I can violate
18 a court order and that would not be breaking the law and the
19 Court couldn't punish me for that.

20 So, I'm not sure -- I mean given, as Judge Netburn
21 examined the circumstances under which he conducted this
22 disclosure, the extent to which he went to hide this
23 disclosure, not just from the lawyers but from anyone finding
24 out that he was the source of this, on what basis do I have to
25 conclude that somehow he was just an ignorant layperson who had

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1 no idea he was committing the crime?

2 MR. GERBER: Your Honor, a few points.

3 First, an individual can appreciate -- or an
4 individual can be aware of the potential for sanctions and an
5 array of sanctions but not appreciate the potential for a
6 criminal referral. I just think for the record I want to make
7 clear about that.

8 THE COURT: But nobody says that's true in this case.

9 MR. GERBER: Again, your Honor, I -- it is certainly
10 correct that there is no -- his declarations do not speak to
11 either way. The declarations do not speak either way to what
12 sanctions he did or did not appreciate could exist as a result
13 of his conduct. The declarations are silent on the sanctions
14 question. I do just want to make the point, your Honor, that
15 if this were arising in a different -- in a new civil action,
16 for example, if the declarations had been given in civil action
17 no. 1 and this was arising in civil action no. 2, the law is
18 crystal clear that there would be no finding of waiver in civil
19 action no. 2 because of a brightline rule that says in a new
20 action we don't infer waiver from a different proceeding
21 because of the potential for new grounds for apprehension.

22 THE COURT: You are talking about a circumstance that
23 doesn't apply.

24 MR. GERBER: Your Honor, the point we are making is
25 that, as Judge Cote discussed in *Knopf*, within a single

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1 proceeding you can have new grounds for apprehension.

2 THE COURT: That's true, but the scenario that
3 Magistrate Judge Netburn is working with is she told the
4 lawyers, OK, everybody knows there is a protective order, you
5 know what you are supposed to do, you are supposed to notify
6 everybody else what they're supposed to do who has access to
7 this information. This information has been leaked in
8 violation of that order. I want to know who leaked it and so I
9 can take the appropriate action. Ultimately, Mr. Fawcett
10 confesses that he is the culprit and submits affidavits
11 admitting his liability, his responsibility, and exculpating
12 the lawyers. Your critical point is that because there is a
13 reference in the order to possible criminal referral, which was
14 a circumstance that you acknowledge that existed even before
15 she said it and would have existed even if she hadn't said it,
16 that you want me to assume that that means that your client
17 wasn't aware of that possibility before that and only became
18 aware of the possibility of criminal contempt sanctions once he
19 saw that reference in that order, even though that's not what
20 any of his affidavits say.

21 MR. GERBER: Your Honor, his affidavits just don't
22 speak to that issue.

23 THE COURT: I know. None of his affidavits speak to
24 that. Nobody forced him to submit these two affidavits. If he
25 wanted to submit an affidavit on that issue I don't know what

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1 would have prevented him from doing so. I'm not supposed to
2 assume that is the case because he didn't submit an affidavit.
3 This is a person who, up until -- well, let's put it this way.
4 With regard to his past violation, is -- really admitted it and
5 with regard to his continued testimony, that he wants a
6 determination that somehow he didn't realize the extent of the
7 punishment until he saw that reference in an order and so,
8 therefore, that changes the circumstance. Isn't that sort of
9 like saying, well, two things. It is sort of like a Perry
10 Mason moment. It is sort of like, OK, I'm on the stand, I
11 break down and confess to committing the crime, and exculpate
12 the person that is sitting at the table, but now you say I
13 can't be asked any questions -- Perry Mason can't ask me any
14 more questions about that while I'm on the stand. Or that I,
15 you know, I committed a murder and I thought, well, you know
16 what? If they convict me, I might get life in prison. And
17 then I find out that they're going to go for the death penalty
18 so I say, oh, wait a minute, now you are going for the death
19 penalty, everything has changed.

20 I'm not sure -- the question isn't how severe the
21 punishment is, the question is whether you knew at the time
22 that you, even if you were only convicted of disorderly
23 conduct, the question is whether you knew at the time that you
24 provided this information in this proceeding that that
25 information would subject you to punishment and could subject

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1 you to criminal punishment. And I still don't -- I don't hear
2 an argument that your client was not fully aware that his
3 violation of this Court order could subject him to criminal
4 penalties including criminal contempt and a referral which
5 would have been through a referral to the U.S. Attorney's
6 office.

7 MR. GERBER: Well, again, your Honor, I think the
8 record is silent on that but if I may -- if I may --

9 THE COURT: So how can I conclude that if the record
10 is silent?

11 MR. GERBER: Well, no, your Honor. I will say what
12 Klein says that the waiver of the privilege can only be
13 inferred in the most compelling of circumstances. I think,
14 your Honor, to the extent the record is silent I think that
15 that strengthens Mr. Fawcett's point, not the other way.

16 THE COURT: Not to the extent that it is silent on
17 what he thought. If the crux of your argument is that he was
18 under a misconception or was ignorant then it is his
19 responsibility to tell me that. I'm not supposed to assume
20 that, I assume just the opposite. I assume that the conduct
21 that he was involved with clearly, as Magistrate Judge Netburn
22 concluded, clearly is more consistent with knowing the
23 seriousness of the violation that you committed rather than
24 being ignorant of the seriousness of the violation that you are
25 committing and the seriousness of the possible penalty. And

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1 your argument would be significantly advanced, I would assume,
2 if your client were to say I had no idea I could be subject to
3 criminal punishment so it wasn't until I saw that in the
4 Judge's order that it ever dawned on me. I'm not even going to
5 say that I think that that would be sufficient but at least
6 that would advance your argument significantly more than to
7 simply say to me, oh, well, there is nothing in this record and
8 we are to the going to tell you anything about it but we, on
9 the basis of a conclusion that somehow this is a change in his
10 mind of circumstances, it is not a real change in
11 circumstances, it was always subject to these penalties and
12 even then I don't even hear you saying that, making any
13 representation or submitting any evidence about what the
14 lawyers and he discussed or thought when they were preparing
15 this affidavit. I mean, I can't imagine that you would, or
16 anyone from the firm Kreindler & Kreindler would say to this
17 court that they sat down and helped this individual prepare
18 this affidavit without having any discussion with him about the
19 nature of the serious problem that he had just created and the
20 serious consequences that he could face.

21 MR. GERBER: Your Honor, just so the record is clear,
22 we were not representing him at the time.

23 THE COURT: I understand that.

24 MR. GERBER: And, your Honor, I hope the Court
25 appreciates and understands, of course this is not an

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1 evidentiary hearing, I can't make a representation to the Court
2 about what my client has told me.

3 THE COURT: Right. Only your client can make those
4 representations on declarations prior.

5 MR. GERBER: Your Honor, if I may, you referenced
6 Perry Mason, and if I can use that opportunity to turn to the
7 other prong of the Klein test because your Honor made the
8 point, used the example of an individual on the witness stand
9 who testifies to certain matters and then wants to stop. It is
10 critical here, and we cited cases in this regard, EF Hutton and
11 Candor and the Vitamins Antitrust Litigation case out of D.C.
12 that do draw a distinction, an important distinction between
13 trial testimony or a situation where a jury is a fact finder
14 and situations where a Judge is a fact finder. And Klein does
15 say that a Court should not find a waiver unless a failure to
16 find a waiver would prejudice a party to the litigation.

17 THE COURT: You don't think parties in this litigation
18 would be prejudiced -- both of them -- if his testimony that he
19 was the one responsible and not the lawyers was withheld, was
20 ignored?

21 MR. GERBER: So, your Honor, the fact that his
22 description of what he did, the acknowledgment of what he did,
23 we are not asking that that be struck precisely because as to
24 that piece there would be prejudice.

25 THE COURT: Suppose he is lying. Suppose he is lying.

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1 Suppose that's not true. What are you supposed to do with
2 that? Can he be cross-examined on that?

3 MR. GERBER: Your Honor, that point, though, of what
4 if the individual is lying, that's true every time -- every
5 time -- someone invokes.

6 THE COURT: Right, and that doesn't mean it is not a
7 consideration with regard to whether or not he is entitled to
8 give partial statements and not have them tested by
9 cross-examination.

10 MR. GERBER: Right. And, your Honor, the question
11 then becomes what Klein says -- what Klein says is because,
12 again, every case that is always going to be a concern, the
13 Fifth Amendment stands as a block, as a barrier to
14 fact-finding. The question becomes is there a path -- what
15 Klein is telling the Court to do is, is there a path to not
16 finding waiver without prejudicing the parties? And in a world
17 in which the Court did not strike his admission about what he
18 did but otherwise struck statements that are prejudicial to a
19 party, the parties are no worse off. They're no worse off
20 than --

21 THE COURT: But in those cases those were not relevant
22 issues, they were not determinative issues. The Court decided
23 that it could decide the issues in this case without arising at
24 those other determinations. In this case we say there is no
25 prejudice. In this case what -- I'm not even sure, I have read

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1 it several times the two declarations. I'm not sure which
2 portions you say should be added and which portions you say
3 should be out.

4 Let me give you a scenario: Magistrate Judge Netburn
5 holds this hearing on Monday, calls a Kreindler lawyer and
6 doesn't believe him or her. OK?

7 MR. GERBER: Yes, your Honor.

8 THE COURT: Then is it your position that she should
9 act as if there is no evidence that Mr. Fawcett was responsible
10 for this?

11 MR. GERBER: No. No. Your Honor, we completely agree
12 that Judge Netburn should take account of what Mr. Fawcett did
13 and he is responsible for it.

14 THE COURT: He is the only one who says it and he is
15 the only one that can testify to that.

16 MR. GERBER: Your Honor, again, we are not
17 disputing --

18 THE COURT: In what form? I just don't understand
19 your solution here. In what form do you say he should be
20 examined and to what extent, do you say, that examination
21 should be limited?

22 MR. GERBER: Your Honor, our position is that what the
23 Court can do, consistent with the first prong of Klein, is
24 strike portions of the declarations --

25 THE COURT: Which portions?

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1 MR. GERBER: Any portion that in any way prejudices a
2 party keeping his admissions to what he did.

3 THE COURT: Well, doesn't his taking responsibility
4 for and deflecting it from the lawyer, if that is not
5 admissible testimony to be examined under oath doesn't
6 withholding that testimony prejudice one side? And if we cut
7 out his declaration that he was the person involved and not the
8 lawyer, doesn't that prejudice the other side?

9 MR. GERBER: Your Honor, I'm sorry. For a moment
10 there the feed cut out so, I apologize, I did not hear your
11 question.

12 THE COURT: That's fine.

13 My question was, basically, how do you not prejudice
14 one side or the other? This person has testimony to give and
15 that testimony is favorable to the lawyers at the law firm. He
16 says they didn't know nothing, I did it all myself. Your
17 proposition is that that part should stay in but the other side
18 should not have an opportunity to cross examine him on that and
19 in what form -- you are saying it should be submitted in the
20 form of the declaration or he should be examined, direct and
21 cross-examined, on that issue?

22 MR. GERBER: No, your Honor. Our position is that the
23 Court should find that there was no waiver, that he should be
24 permitted to invoke and not be called as a witness against
25 himself. At the same time, to avoid prejudice to the parties,

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1 the Court could strike portions of his declaration keeping his
2 admissions of what he did.

3 THE COURT: Suppose his declaration is untrue. In
4 what proceeding would you accept the out-of-court sworn
5 declaration of a witness and not subject that witness to
6 cross-examination on that issue?

7 MR. GERBER: Well, your Honor, in this context -- I
8 mean to the extent we are talking about his admissions of his
9 conduct which, to say the least, are not to his benefit, quite
10 the opposite, as the Court has noted, and I think are not in
11 dispute in the case in terms of what he himself did, I don't
12 think anyone is disputing that. He is acknowledging it, I
13 don't think as to what he did the parties are fighting about
14 that.

15 THE COURT: No. I'm not going to say that.
16 Acknowledge is not the right word. He has submitted an
17 affidavit making these statements. OK? I don't know if it is
18 true. I don't know if it is false. I don't know if it is
19 partially true. I don't know if it is partially false. I have
20 no idea. Your assumption is that it should be accepted in the
21 limited manner that he has presented it and accepted it as
22 being true. I'm not sure what kind of procedure that is.

23 MR. GERBER: Your Honor, it is a procedure that is
24 designed to try to preserve his Fifth Amendment privilege
25 without prejudicing the parties and, again, I do want to

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1 emphasize that any time someone is invoking it is depriving a
2 fact finder of the opportunity to gain additional facts.

3 THE COURT: But what you are asking me to do is a
4 little different than what is done in the cases. What is done
5 in the cases is that when there is found to be a legitimate
6 basis to assert the Fifth that it deprives a witness of some
7 valuable testimony. It is the Court's responsibility to the
8 process and to the parties to fashion a reasonable alternative.
9 None of those cases say that that can be manipulated in order
10 to provide the witness an opportunity to take the Fifth.
11 That's not what those cases say. They don't say that, they say
12 that -- and it is not even a consideration of -- that is not a
13 part of the consideration of whether he can assert the Fifth.
14 It is a part of the consideration if he can't assert the Fifth
15 whether, how do you, in fairness, present the evidence. If he
16 has a Fifth Amendment privilege and you have an opportunity to
17 otherwise provide that evidence to the Court then the Court has
18 the obligation to do that. I don't read those cases as saying
19 that, look, this is a tool by which you can give him a chance
20 to get out of testifying.

21 MR. GERBER: Your Honor, if may, and very
22 respectfully, I do disagree with the Court on that point about
23 what the cases say.

24 THE COURT: OK. Which case says that?

25 MR. GERBER: For example, in EF Hutton.

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1 THE COURT: Read the language in EF Hutton that you
2 say says that the determination of whether he can assert the
3 Fifth is dependent on whether or not you can fashion partial
4 admission of testimony.

5 MR. GERBER: I'm just pulling the case, your Honor.

6 THE COURT: Yes. Sure. Maybe I have misread it. But
7 I didn't understand that to be part of the test that determines
8 whether or not he can assert the Fifth.

9 MR. GERBER: So, your Honor, and this is what I am
10 trying to get at.

11 THE COURT: Where is it?

12 MR. GERBER: So, in EF Hutton.

13 THE COURT: Where are you?

14 MR. GERBER: I'm on page 117. It is the very end of
15 the EF Hutton decision.

16 THE COURT: Paragraph?

17 MR. GERBER: It is page 117, it is the paragraph
18 beginning: "On the basis of the foregoing analysis..."

19 THE COURT: Right.

20 MR. GERBER: And Court does an analysis and it says
21 the incriminating testimonial statement that Hutton argues
22 forms the basis for a waiver, Smith's affidavit submitted in
23 support of his Rule 14 motion. However, the Court --

24 THE COURT: Sorry. Have to do that over.

25 MR. GERBER: Sorry.

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1 What I was saying was that at page 117, the Court
2 makes the point that the incriminating testimonial statement
3 that Hutton argues form the predicate for a waiver, Smith's
4 affidavit submitted in support of his Rule 14 motion, the Court
5 then notes it denied the Rule 14 motion as being untimely
6 filed. As a result -- and here is the key language -- as a
7 result, even if Smith's affidavits presents a distorted view of
8 the, facts no prejudice can adhere to Hutton as a result of
9 such distortion because the Court has not relied on the Smith
10 affidavit. The second prong of the test for testimonial waiver
11 is therefore not met.

12 THE COURT: That's not this case. You want the
13 parties to rely on the affidavit.

14 MR. GERBER: Your Honor, in these cases, EF Hutton and
15 others, the Court rejects the affidavits entirely in order to
16 avoid the waiver issue. It is not they're not testimony at
17 all, it is not there is not a concern about distortion. The
18 Court says because we want to avoid a waiver, because that is
19 so important because of the constitutional concerns here, we
20 are going to avoid this problem by disregarding the affidavit
21 entirely.

22 We are asking for something short of that. We are not
23 coming and saying --

24 THE COURT: How does that support what you asked for
25 if you are not asking for that?

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1 MR. GERBER: Because we are asking for less.

2 THE COURT: OK.

3 MR. GERBER: Because if a Court, in order to avoid a
4 waiver -- if a Court, in order to avoid the invocation of Fifth
5 Amendment rights can disregard a declaration entirely then
6 surely a Court, by definition, logically, has the authority,
7 has the ability and can and should strike portions of a
8 declaration. One is less than the other.

9 THE COURT: I can only disregard the declaration
10 entirely if I find that he has a Fifth Amendment privilege.

11 MR. GERBER: I'm sorry, your Honor. I missed the last
12 statement.

13 THE COURT: I can only disregard the affidavit
14 entirely if I first find he has a Fifth Amendment privilege.
15 It is not the other way around. It is not that I disregard the
16 affidavit to see if that gives him a chance to assert a Fifth
17 Amendment privilege.

18 I understand your prejudice argument but I am still
19 not sure I understand how I can make, or Magistrate Judge
20 Netburn can make, a decision on this bare record that neither
21 party will be prejudiced. It would be quite awkward -- and it
22 could happen -- and if it is compelled if the law compels it,
23 but it would be quite awkward for Magistrate Judge Netburn to
24 say I'm going to disregard the declarations so therefore there
25 is no evidence in this case whatsoever that supports the

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1 lawyers assertions that they didn't know. OK? And that would
2 be prejudice. All right? That would be prejudice to them,
3 particularly if she were to make what would be an awkward
4 decision to say that the reason I'm going to rule against the
5 lawyers is because I don't believe them alone and they have no
6 corroborating evidence of this because I have just ignored the
7 corroborating affidavits that support it. And if she does
8 allow just the affidavit, doesn't that prejudice the other side
9 to say, well, wait a minute, we don't think that's true. That
10 statement is not true and we believe that we can demonstrate
11 that that statement is not true through examination of this
12 witness under oath, whereas consistent with a proceeding that
13 the Court has already set up a process where the direct
14 examination are the affidavits.

15 My understanding is the way this is going to be
16 conducted, the direct examination are the affidavits that have
17 been submit and they will be going straight into
18 cross-examination of those witnesses.

19 So this isn't a question of just a question of
20 admissibility. It is a question of what you do with this
21 evidence that I -- it would be quite unusual for me to say that
22 Magistrate Judge Netburn can decide on, based on these
23 affidavits, which paragraph she is going to let in and which
24 paragraph she is going to keep out and make a determination
25 that it doesn't prejudice either side.

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1 MR. GERBER: Your Honor, I would just point out that
2 there are lots of circumstances -- lots -- in which a Court, a
3 fact finder has information that it can't rely on for a variety
4 of reasons. Judges do this all the time, testimony has been
5 struck for any number of reasons, Courts may disregard
6 something, whatever it may be. So, the fact that the Judge has
7 certain information and then for whatever reason is not relying
8 on it on findings of fact, that's not unheard of, that's not so
9 uncommon.

10 THE COURT: But that's not what you are proposing.
11 You are proposing piecemeal to pick -- for example, give me an
12 example of a paragraph that you say should be kept in or a
13 sentence should be kept in. Give me an example of a sentence
14 you say should be deleted.

15 MR. GERBER: Your Honor, before I read from the
16 declaration I just want to be sure in terms of what is under
17 seal and what is not.

18 THE COURT: You are right. You are right. I'm sorry.
19 Don't give me a paragraph then, talk about it in general. I
20 don't understand the nature of the information that you say
21 should be allowed and should be allowed without
22 cross-examination and the nature of the information you say
23 should be precluded.

24 MR. GERBER: Sure.

25 THE COURT: What is the information?

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1 MR. GERBER: So, your Honor, there are certain
2 sentences or paragraphs where Mr. Fawcett is describing things
3 that he did and they are contrary to the Court's order. There
4 are sentences in here, paragraphs in fact, that are in no way
5 self-serving. Frankly, they are directly contrary to our
6 client's interests discussing things that he did that
7 contravenes a Court order.

8 THE COURT: You say it should be limited, he should be
9 able to shoes by declaration, the extent or the limit of how he
10 is going to discuss that issue. Because I don't know how --
11 you are saying because your position still is -- I'm not sure
12 what your position is. Is your position that the parties get
13 cross-examination on that issue?

14 MR. GERBER: No, your Honor. No.

15 THE COURT: OK. That's what I thought.

16 MR. GERBER: No.

17 THE COURT: So we are just supposed to accept it as
18 true?

19 MR. GERBER: Your Honor, the thrust of the Fifth
20 Amendment is to protect an individual from being a witness
21 against himself.

22 THE COURT: I know, but the information we are talking
23 about is information you acknowledge is not protected by the
24 Fifth Amendment. You are saying that I should let the parties
25 use, as evidence in this proceeding, some incriminating

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1 statement. So, is it your position that that also applies to
2 him that the Court should use those incriminating statements to
3 the limit that they lay out in this affidavit against and for
4 all of the parties including him?

5 MR. GERBER: The statements regarding his own conduct?
6 Yes. Yes, your Honor. Yes.

7 THE COURT: All right. So how is that consistent with
8 a Fifth Amendment.

9 MR. GERBER: Your Honor, he did not invoke before.

10 THE COURT: Right.

11 MR. GERBER: He is seeking to invoke now.

12 THE COURT: Right. So your real critical argument is
13 really whether or not there is a change of circumstance because
14 without a change of circumstance, you wouldn't have an
15 argument. Right? You say he invoked before and now that
16 things have changed -- he didn't invoke before but now that
17 things have changed he is invoking.

18 MR. GERBER: No.

19 THE COURT: Is there anything in his first affidavit
20 that you say is protected by his Fifth Amendment privilege even
21 though he put it in the affidavit at the time? And are you
22 saying it was protected on the date that he submitted it? Or
23 are you saying he is now only protected because of the
24 subsequent reference to criminal penalty?

25 MR. GERBER: Your Honor, I want to be clear on our

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1 position. We are not suggesting that as to either declaration
2 the statements in those declarations are somehow protected by
3 the Fifth Amendment. He did not invoke before so we are not
4 saying -- we are not suggesting that there is somehow Fifth
5 Amendment protection here on those statements the question is
6 whether he can invoke now.

7 THE COURT: Right. OK. That's what I'm trying to
8 focus on. I want to understand your argument. So, your
9 argument is not that he invoked his Fifth Amendment privilege
10 at any time prior to Magistrate Judge Netburn's order.

11 MR. GERBER: He did not.

12 THE COURT: OK. And if Magistrate Netburn hadn't put
13 that reference in that order you wouldn't have an argument.

14 MR. GERBER: No, we would, your Honor, under prong
15 one. Under prong one. Your Honor, I take your point as to
16 prong --

17 THE COURT: No. What I am trying to understand, what
18 would be your argument -- if he told me he didn't invoke, he
19 didn't assert his Fifth Amendment right when he voluntarily
20 submitted an affidavit in this litigation, I'm not sure what is
21 your argument that, absent what you claim is a change of
22 circumstance, he was protected from giving further testimony
23 even though he had given testimony by declaration.

24 MR. GERBER: Your Honor, that's the question under
25 prong one. The question is whether there is a way to avoid a

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1 finding of waiver without prejudicing the parties.

2 THE COURT: Right. And you say the way to do that is
3 to eliminate evidence that is favorable to whom and to leave in
4 evidence that is favorable to whom.

5 MR. GERBER: The way to do that is to leave in any
6 statements that are contrary to his interests that neither
7 party can characterize is self-serving. To the extent -- and
8 Saudi Arabia --

9 THE COURT: Isn't that pretty much every one of those
10 statements?

11 MR. GERBER: No, your Honor. I don't think that's
12 correct.

13 THE COURT: All right. So you say that you will leave
14 in any criminal conduct that -- or any conduct that he admitted
15 his own wrongful acts?

16 MR. GERBER: Your Honor, I do want to be clear for the
17 record that we are not -- I hope the Court can appreciate why I
18 am saying this. We are not conceding --

19 THE COURT: No.

20 MR. GERBER: -- criminality as probably the Court can
21 appreciate but, yes, your Honor, there is conduct described in
22 the declarations that is contrary to the Court's order; there
23 are statements in there. I think it is beyond dispute. I
24 don't think anyone will dispute that there are statements in
25 there that are in no way self-serving and are contrary to his

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1 interests and they are admissions regarding that conduct and we
2 are not asking that those be struck. However, Saudi Arabia has
3 pointed out, they've identified certain portions of the
4 declarations that they believe are self-serving, whether it is
5 serving Kreindler's interests or Mr. Fawcett's interest, and to
6 leave those in would prejudice a party. And we understand that
7 Klein makes clear that you can't say no waiver if that's going
8 to prejudice a party. So we think the Court --

9 THE COURT: You think Kreindler is going to say
10 they're not prejudiced by your taking out of this declaration
11 his statement that none of the Kreindler lawyers were involved
12 in this disclosure?

13 MR. GERBER: Your Honor, they are --

14 THE COURT: Do you agree with that?

15 MR. GERBER: I think the question is are they
16 prejudiced relative to where they would have been ex ante, that
17 is, where would they have been if he had invoked to begin with.
18 And the answer is, no, they're not prejudiced, they're no worse
19 off. The world, as to Kreindler, looks the same. They are no
20 worse off if that is struck. It is as if he had not made those
21 statements before, it is as if he had invoked before and in
22 that sense they are no worse off.

23 THE COURT: It is not as if he had invoked before
24 because if he had invoked before, none of this testimony would
25 be there, nobody could take advantage of this to the other's

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1 disadvantage. So I don't understand how that is supposed to
2 make everybody happy, by saying that you are just going to --
3 that just going to let one side, let Saudi Arabia pick the
4 stuff that they don't like and take it out and then just use
5 the stuff that they do like against the Kreindler lawyer. And
6 the Kreindler lawyer says, yeah, that's all right with me.

7 I mean, you really think that that's a viable
8 solution?

9 MR. GERBER: Your Honor, I actually do think it is
10 viable solution and I think I do think --

11 THE COURT: The lawyers -- because they haven't spoken
12 up on this issue so I don't what basis that you believe that
13 they would agree. And, who is going to make that
14 determination? Magistrate Judge Netburn? Or the Saudi Arabia
15 lawyers?

16 MR. GERBER: No. I think the parties would make their
17 submissions to the Court and Judge Netburn would strike what
18 she thinks appropriate.

19 Your Honor, what Klein makes clear, I think I submit,
20 is that given the importance of the Fifth Amendment right, a
21 Court should try to find a way to avoid a waiver. I think
22 Klein and EF Hutton --

23 THE COURT: I'm not going to accept that. It is not
24 what it stands for. It is not my job to try to find a way to
25 avoid a waiver. My job is to determine whether in fact there

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1 was a waiver. I'm not supposed to fix this for your client,
2 I'm supposed to determine whether your client made a conscious
3 decision that he would forego asserting his Fifth Amendment
4 privilege in order to provide the information in this
5 litigation that he thought was important to provide and whether
6 he knowingly and voluntarily did that. I'm not supposed to
7 help him. I'm not supposed to fix this for him. I am supposed
8 to determine whether he has this right and he asserted this
9 right. And you say he didn't assert this right but you want to
10 fashion a remedy that you say would put the parties in a better
11 position than had he asserted this right. Well, they don't
12 want to be in a better position than when he asserted this
13 right. They want to be in a better position than they're in if
14 he has such a right. And their position is this isn't about
15 trying to figure out whether or not we can help him now undo
16 his waiver. This is about whether or not he in fact had that
17 right and we agree that he did. And then the question is
18 whether he knowingly and voluntarily decided, even though I
19 don't have to give this testimony in this proceeding, I am
20 going to give it anyway even though I know it's going to
21 incriminate me and even though I know that, to the extent that
22 it may incriminate me, I still think it is important to do.

23 Do you think if, on Monday morning, a Kreindler lawyer
24 says that when we prepared this affidavit we explained to him
25 the serious nature of providing this affidavit and that he

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1 would be confessing to a crime and that he might have serious
2 consequences for it once the Judge finds out that he did this
3 in violation of the order. Do you think that, under those
4 circumstances, that I or Magistrate Judge Netburn will have
5 some basis to argue he didn't waive?

6 MR. GERBER: Under prong two? No. I agree under
7 prong two.

8 THE COURT: Prong one?

9 MR. GERBER: Prong one is a question about prejudice.
10 Prong two goes to what he understood and the scenario your
11 Honor is describing. I understand. You are describing a
12 scenario where there is evidence about what he understood.
13 Your Honor --

14 THE COURT: How did we get to that? How does one get
15 to that? How does one get to the truth? How does one get to
16 that if his position now is, I changed my mind; I submitted
17 this affidavit, I said it was my fault, not the lawyers' fault,
18 everybody knows this now, even in court, out-of-court,
19 everybody knows that I said that I'm the one that did it and
20 they didn't have anything to do with it. All right? As long
21 as he is concerned, case closed, he can go home.

22 I am not sure -- I guess the critical argument that
23 you have really made because I still don't completely
24 understand your lack of prejudice argument. I mean, I don't
25 think, as they say, on prejudice, sometimes you can just use

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1 the happy test. Who is going to be happy with that? Explain
2 to me how both sides are going to be happy with that result.
3 That's the simple prejudice test. But, ultimately, it really
4 does -- it is not so much the prejudice test, it is the
5 question of whether or not the order that Magistrate Judge
6 Netburn issued changed the circumstance. Because before that
7 order, the circumstances were that he voluntarily submitted
8 sworn testimony by declaration in this case and forewent any
9 assertion of the Fifth Amendment privilege, and had not
10 Magistrate Judge Netburn issued this order with that language
11 in it, you would not be in a position to argue the first most
12 important part of the test is whether or not he is being
13 compelled to testify as a witness against himself and that's
14 what the Fifth Amendment is about because he is not -- no one
15 made him do this. No one -- I don't even have any evidence
16 that anybody even asked him to do this -- somebody may have
17 asked him to do it -- but I have no reason to conclude that he
18 didn't have a choice and made the choice that rather than to
19 stay solid or to refuse to testify because of the exposure that
20 would inevitably result, that there is no reason to conclude
21 that when he did these acts under the circumstances in which he
22 admits that he did these acts, the surreptitious way that he
23 did these acts and his decision to submit not just one but two
24 declarations in this litigation, declarations submitted to
25 convince the Court that -- well, to accept the responsibility

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1 for the leak and deflect that responsibility from the lawyers,
2 that that was clearly a conscious decision and the purpose of
3 these declarations, that somehow he could make that choice and
4 we can still fashion a process to allow him to do that to both
5 invoke the Fifth and submit testimonial evidence at the same
6 time. And I have difficulty and I think Magistrate Judge
7 Netburn had difficulty reconciling those two, you know.

8 I don't, given the serious nature of -- given what
9 should have been clear to everyone who had access to this
10 material that it would be a violation of law for them to
11 disclose this material, and given no evidence in this case that
12 this individual did not understand that it was a violation of
13 law to violate that Court order, that somehow doing that, not
14 just on one or two occasions is somehow reflective of his
15 desire not to incriminate himself, he made a conscious decision
16 to incriminate himself and whether or not he thought that the
17 consequences of doing that might be slight or might be serious,
18 it is difficult for me to speculate that somehow he thought
19 this wasn't a big deal and that, at most, he would get a
20 reprimand or a slap on the wrist when he got caught. And his
21 conduct doesn't even reflect that. The way he did it doesn't
22 reflect that.

23 So I am trying to understand if you have any other
24 argument that would give him the right to invoke the Fifth now
25 if he didn't invoke the Fifth at any time prior to Magistrate

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1 Judge Netburn's order and the argument that you make that he
2 had the right to invoke it after the order was that she
3 explicitly said she was looking at possible criminal referral
4 to the U.S. Attorney's office and that's the critical thing
5 that changed his view of whether he wanted to voluntarily
6 continue to voluntarily provide testimony in this providing
7 after submitting two declarations under oath.

8 But, let me hear from Mr. Kellogg and then I will let
9 you respond.

10 MR. KELLOGG: Thank you, Judge Daniels, and may it
11 please the Court; I will try to be brief because I know you
12 read the transcript from yesterday and I don't want to repeat
13 points.

14 First, on the reason to know issue, his claim now that
15 he didn't understand the seriousness of what he admitted to is
16 inappropriate under Klein where the Court said, and I quote,
17 any witness -- any witness -- who makes testimonial
18 incriminating statements, plainly has reason to know when he
19 does so that these statements may be interpreted as a waiver of
20 his Fifth Amendment privilege against self-incrimination.

21 Now, Mr. Fawcett, who has worked as a legal
22 investigator for 20 years, was better able to understand the
23 legal consequences of his actions than many witnesses face with
24 similar choices indeed. It is undisputed that he had access to
25 personal criminal defense counsel when he signed the

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1 declaration. Heal allocuted to a serious offense. He knew the
2 protective orders were in place, he knew the materials he gave
3 violated two protective orders. He took great steps to hide
4 his wrongdoing and he destroyed evidence. He admitted to all
5 of those things in his declaration and he said I take
6 responsibility for my actions which is itself an admission that
7 he knows that he is incriminated. Mr. Gerber's only response
8 to that is to claim that it was not the same as a judicial
9 proceeding because the Court's October 4 order created new
10 grounds for apprehension. Magistrate Judge Netburn rightly
11 rejected both those points. She said they are, I remind you,
12 entirely of the same proceeding which began when the protective
13 order violations were first discovered. And that is obviously
14 the case.

15 Mr. Fawcett has been a potential target of this since
16 the very start and his incriminating statements were not
17 somehow wiped off by the October 4 order mentioning potential
18 criminal sanctions.

19 Magistrate Judge Netburn also found, based on her
20 familiarity with all of the circumstances, that it was not
21 credible that Fawcett did not understand he was incriminating
22 himself at the time he signed the declarations. Neither of
23 those findings are clearly erroneous.

24 So let me turn now to the other prong. The Court hit
25 the nail on the head when it said Mr. Fawcett cannot testify

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1 about some matters and invoke the Fifth Amendment on others. I
2 could cite you cases all day long saying that starting with the
3 Supreme Court's decision in *Mitchell v. United States* when he
4 said, first said it is well established that a witness may not
5 testify voluntarily about a subject and then invoke the
6 privilege against self-incrimination when questioned about the
7 details. So, having deciding to incriminate himself,
8 Mr. Fawcett cannot take back that decision and assert the
9 privilege to prevent cross-examination on statements he chose
10 to make in his declarations otherwise, as Magistrate Judge
11 Netburn pointed out, witnesses could distort the truth by
12 testifying to some fact, denying or withholding others, and
13 asserting the privilege as a bar to cross-examination that
14 would reveal the whole truth. This Court --

15 THE COURT: Let me just make sure I have all the facts
16 right.

17 My understanding is that Magistrate Judge Netburn
18 limited her decision to examination relative to the information
19 that's in the declaration. She did not issue a blanket rule
20 saying, for no purpose, under no circumstances, could he not
21 invoke the privilege if he was being asked about some other
22 subject matter which might expose him personally.

23 MR. KELLOGG: Absolutely correct, your Honor. As the
24 Court said in the *Mitchell* case, the proper scope of
25 cross-examination on its declaration is what's allowed and we

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1 undertook and told Judge Netburn that we would not go beyond
2 the scope of the declarations itself in asking him questions.
3 But we get a chance -- we need a chance to test those. The
4 declarations, even though he said he was taking responsibility,
5 at the same time he gives a very self-serving account designed
6 to mitigate his own culpability and to protect his long-time
7 employers by claiming that he acted without their authorization
8 or knowledge. In my argument yesterday I went through a number
9 of lines of cross-examination and gave a number of examples of
10 statements in his declarations that we think are misleading,
11 false, or incomplete and that we have a right to follow up on
12 those and he can't simply say, no, I'm sorry, here is what I am
13 going to testify to and I'm stopping there, I'm not going to go
14 farther.

15 As the Second Circuit said in *Klein*, a distortion of
16 facts by committing a witness to select any stopping place in
17 his testimony is antithetical to the Fifth Amendment.

18 And Magistrate Judge Netburn, at page 27 of the
19 transcript, made clear that what is being proposed by defense
20 counsel is some sort of melange while they may consider some of
21 his statements but not others. But there is no way for the
22 Court to reach its ultimate conclusion, which is the purpose of
23 the hearing on Monday, without being left with distorted facts
24 if Mr. Fawcett's account is not subject to cross-examination.

25 Judge Learned Hand, in *St. Pierre*, made the same

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1 point: The time for a witness to protect himself is when a
2 decision is first presented to him. Anything more puts a
3 mischievous instrument at his disposal. He can tell a little
4 bit of the truth and withhold things and say I'm not going to
5 answer questions. It is just -- there is no case that allows
6 that. And the ones that Mr. Gerber cites, including
7 particularly *Hutton*, do not hold that at all. In *Hutton*, the
8 affidavit in question was considered completely collateral and
9 unnecessary to the Court's decision which denied relief on a
10 timeliness ground and therefore was not subject to its
11 distorted few of the facts in the declaration.

12 It is important to realize just how bizarre the
13 procedure that Mr. Gerber is proposing, that somehow the Court
14 is going to go through the declaration and say, *Well, we will*
15 *throw out this one, we will throw out this one. You can ask*
16 *about this, you can't ask about that.* That's not a choice the
17 defendant gets to make once he has waived his Fifth Amendment
18 right.

19 Those are the main points I wanted to make, your
20 Honor. I am happy to answer any questions.

21 THE COURT: Mr. Gerber, did you want to add anything
22 further?

23 MR. GERBER: Your Honor, I don't want to belabor our
24 arguments, the Court has our arguments. I do want to say,
25 emphasize one last time, a product of a criminal referral, a

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1 Judge saying that a criminal referral to the U.S. Attorney's
2 office is in prospect, is in contemplation, I do submit it is a
3 game-changer. I do. I think that's true I think for anybody,
4 I think it is particularly true for a non-lawyer, a Judge
5 saying that she is considering a criminal referral changes the
6 landscape. I do respectfully submit that. But otherwise, your
7 Honor, you have our argument.

8 (Continued next page)

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1 THE COURT: How is that different than prior to her
2 issuing -- I mean, you're not saying that she considered it
3 when she wrote the order, but never considered it and that
4 wasn't a possibility?

5 MR. GERBER: No, in terms of an individual's degree of
6 apprehension, being told that a federal judge is considering a
7 referral to the US attorney's office for the Southern District
8 of New York increases that person's degree of apprehension, I
9 do submit that that is the case.

10 THE COURT: But that's not part of increasing their
11 level of apprehension.

12 MR. GERBER: I mean, the question is, are there new
13 grounds for apprehension, your Honor. And our position is,
14 yes.

15 THE COURT: Your argument is because the clients had
16 reason to believe something different before or are you arguing
17 that simply because it was articulated by Netburn? My reading
18 of the transcript, Netburn said what I expected her to say,
19 look, I didn't wave a magic wand here and make this a new
20 penalty. This is what everyone should have understood was part
21 of and was the -- hold on a second, let me have the protective
22 order -- that part of the protective order that says that any
23 violation of this order is punishable by money damages caused
24 by the violation, including but not limited to all attorney's
25 fees, court costs, exhibit costs, expert witness fees, travel

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1 expenses, all related litigation costs and actual damages
2 incurred by the other party, equitable relief, injunctive
3 relief, sanctions or any other remedy as the Court deems
4 appropriate -- please mute yourself -- particularly, any other
5 remedy as the Court deems appropriate. Doesn't that include
6 criminal sanctions?

7 MR. GERBER: Your Honor, I think that that language,
8 particularly to a nonlawyer, lists a whole lot of things which
9 are civil forms of relief. Criminal sanctions is not listed
10 there.

11 THE COURT: The serious problem I have with your
12 argument is that you are not representing that's what your
13 client knew.

14 MR. GERBER: Your Honor, again, I can't testify for my
15 client here. I can't speak for my client.

16 THE COURT: He can submit an affidavit if he wants.
17 I'm not preventing him from doing that. I'm really in a
18 position at hearing, at trial to assume something is true
19 because the lawyers say there's no evidence in the record that
20 it's not true. There's got to be some evidence in the record
21 that it is true. And you have scrupulously avoided making such
22 a representation that your client ever thought that he could
23 get away with this without exposing himself to criminal
24 liability.

25 MR. GERBER: Your Honor, for all the reasons I'm sure

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1 the Court can appreciate, I cannot say, oh, my client told me
2 this or that.

3 THE COURT: Your client could -- look, we know how you
4 can do it. He can submit a declaration. He's submitted two
5 declarations already. There's nothing that prevented him from
6 submitting a declaration saying that he's so inexperienced that
7 he never thought that he could go to jail for violating this
8 court's order. And quite frankly, I would be very surprised if
9 he was in a position to legitimately and truthfully allege
10 that.

11 MR. KELLOGG: Your Honor, if I may make one point. I
12 don't think even if they were at this point putting a
13 self-serving declaration in saying, I didn't know, that would
14 not overcome the evidence that Judge Netburn relied upon in
15 making her conclusion, but that he did understand he was
16 incriminating himself at the time that he signed the
17 declarations and the declarations themselves which make that
18 clear and the fact that he had advice of counsel when he was
19 doing it. It would just be preposterous at this point for him
20 to put in a declaration. And indeed, that's potential
21 possibility of criminal sanctions.

22 THE COURT: I mean, you can probably tell that I have
23 read through all of these papers. And I think the Magistrate
24 Judge Netburn's decision was appropriate, not in any error of
25 law or in any way not supported by the facts and the law here.

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1 Her determination that this witness who has begun his
2 testimony, right, voluntarily submitting affidavits on the very
3 issue and not just affidavits, significant affidavits on the
4 very issue that the magistrate judge is considering and, as he
5 stated in his affidavit, taking responsibility for the conduct
6 that's at issue here as a witness -- not as an accused -- that
7 there's no reason in this record to conclude other than what
8 Magistrate Judge Netburn concluded. That he was fully aware of
9 the consequences and serious nature of the conduct that he has
10 said he was involved in and the serious consequences that might
11 follow as a result of that conduct. Being fully aware that he
12 made a decision to submit sworn testimony to influence this
13 court in its determination as to who was responsible and as to
14 who was either solely or additionally responsible. And he did
15 that knowing that there would be very serious consequences,
16 including consequences for violating a court order. There is
17 no reason to believe that he did not understand that violating
18 a court order constitutes criminal contempt, which can be
19 prosecuted within the power of the Court's power to prosecute.
20 And adding no evidence to the contrary that he believed
21 anything else.

22 And the evidence, the circumstantial evidence is that
23 he acted in a way and made statements in his affidavits in a
24 way that clearly indicated that he made a conscious choice to
25 forego those penalties and punishments and to instead take

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1 responsibility for the violation of law and to disclose that in
2 this proceeding in the nature of sworn testimony, that he
3 intends to influence the Court.

4 That being the case, I find that there was no change
5 of circumstances here. The Court's reference in its order, as
6 I say, is not even a reference to him. It's a general
7 reference to the availability of sanction and punishment that
8 is consistent with the language of the protective order, did
9 not change the circumstances under which Mr. Fawcett found
10 himself, and did not somehow change this into a different
11 proceeding, depending on whether or not he wants to say that
12 now the Court has used words that now make me more afraid than
13 I was before of what's going to happen to me. He knew that he
14 had violated the law. He knew that there were possible
15 consequences. And there's no logical reason, based on his
16 conduct or his statements in his affidavit, to conclude that he
17 wasn't fully aware of the rights he was waiving when he decided
18 to voluntarily give testimony in this case to influence the
19 Court's determination as to how to resolve the issues.

20 That being said, he has already given testimony by two
21 sworn declarations. His testimony by those declarations and
22 the testimony of others by those declarations are already
23 considered to be testimony at this hearing. And the next step
24 is cross-examination with regard to testimony at this hearing.
25 And based on the facts before Magistrate Judge Netburn, he does

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1 not have the opportunity to submit that limited testimony in
2 this proceeding and decide that that's the only extent to which
3 he will make disclosures in this case under oath and that he
4 will not further subject himself to either direct examination
5 or cross-examination by any of the parties in this litigation.
6 Because now that he somehow thinks that this seems a little
7 more serious than he thought it was going to be when he made
8 that initial decision -- if he did make that initial
9 decision -- to make these disclosures in violation of a court
10 order and to disclose voluntarily if he was the one who was
11 responsible. Whether or not others are responsible for that
12 are still relevant issues within Magistrate Judge Netburn's
13 determination. And to what extent his testimony is truthful,
14 accurate and reliable is still an issue as it's an issue to all
15 witnesses and what the appropriateness of the sanctions might
16 be, given the nature of the conduct, is still an issue before
17 Magistrate Judge Netburn. All of those issues need to be
18 resolved in this hearing.

19 Given his conduct in this hearing so far, I find that
20 it was appropriate for Magistrate Judge Netburn to deny him a
21 right to now assert the Fifth after having made these
22 disclosures in this litigation under oath intended to influence
23 the determination of the Court.

24 I find that the arguments with regard to no prejudice
25 are not persuasive. I think there's not only prejudice to the

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1 parties, I think that there could be significant prejudice to
2 the integrity of -- given the fact that this information is now
3 out there and if there's no way to test the voracity of this
4 information, I find that the parties can -- Saudi Arabia or
5 other parties -- can be significantly affected and publications
6 that are out there in response to the disclosures that
7 demonstrate that even this person -- if this person is going to
8 be a witness -- might be called by either side, that that
9 person's credibility has already been tarnished outside of this
10 courtroom.

11 Information with regard to this case is now
12 information that's disclosed publicly. And much of that
13 information is not necessarily information that has been tested
14 in a court of law.

15 So given all those reasons, I believe Magistrate Judge
16 Netburn made the right decision and that it was appropriate for
17 her to deny an invocation of the Fifth Amendment and to order
18 this witness -- and as I said, need I say -- under penalties of
19 contempt to further give testimony in this hearing or face both
20 the possibility of further criminal or civil sanctions and
21 punishment if he refuses a lawful court order to testify.
22 That's the order of the Court.

23 Anything further, gentleman?

24 MR. GERBER: No, your Honor.

25 MR. KELLOGG: No, Judge. Thank you.

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THE COURT: We're adjourned.

(Adjourned)